

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 528 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NAFISABANU GULAMBHAI MEMON

Versus

COLLECTOR

Appearance:

MR JV JAPPEE for Petitioner
Mr.B.Y.Mankad, learned A.G.P.
for Respondent Nos. 1,2, 5, 6 and 7
Mr.Asim Pandya for Respondent Nos. 3 & 4

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 08/03/99

ORAL JUDGEMENT

1. The petitioner had purchased the land bearing City Survey No.5199 and City Survey No.6110 admeasuring 89.24 sq.mts. and 40.21 sq.mts. respectively situated at Idar on 23.4.85 through a registered sale deed from one Harmilaben H.Gurjar. The land bearing City Survey No.6110 had been originally allotted by the Collector to

the petitioner's predecessor in title as new tenure land by the order dt.10.1.84 and, therefore, the sale in respect of this City Survey No.6110 was effected after obtaining the requisite permission from the Collector, who had granted such permission subject to the compliance of the conditions of the original allotment. The date of original allotment in favour of Harmilaben H. Gurjar was 10.1.84 and according to the conditions set out in the order of allotment in respect of this new tenure land the construction thereon was to be completed within a period of two years. Since the petitioner had stepped into the shoes of her predecessor in title and the permission in respect of the sale of this land to the petitioner was also made subject to the conditions of original allotment, the petitioner too was required to complete the construction within a period of two years from 10.1.84, although she had purchased this land on 23.4.85. Thus, the construction as per the original order of allotment was to be completed by 10.1.86.

2. The petitioner's case is that she had started the construction immediately after the sale but could not complete it because her neighbours were objecting to it and they had also protested and filed complaint before the Collector and on account of such obstructing activities of her neighbours she could not complete the construction within the time limit of two years. The petitioner had also pleaded grounds of weak financial position and her prolonged ailment. The petitioner has also come with the case that she had also obtained construction permission from Idar Municipal Borough on 4.9.96 and such permission was granted on the basis of the Resolution No.4(5) of the Town Planning Committee having approved the plan submitted by the petitioner. In terms of this permission of the Municipal Borough with regard to the construction, the petitioner was to commence the construction within a period of one year from 4.9.96 i.e. the construction was to commence on or before 4.9.97. The petitioner's case is that the construction as such had been commenced on the basis of the permission dt.4.9.96 but the same was objected to by her neighbours and certain interested persons with oblique and ulterior motive made a complaint before the Collector that the petitioner had not completed the construction within two years as required under the Sanad and the conditions mentioned in the original order of allotment in favour of the petitioner's predecessor in title. The case, which was raised against the petitioner, was that since she had stepped into the shoes of her predecessor in title and the permission had also been granted on the same conditions, the construction

should have been completed within two years from the date of the original allotment i.e. on or before 10.1.86. The Collector thereupon initiated proceedings against the petitioner for breach of the condition of the original allotment and after notice to the petitioner, the Collector passed the order dt.29.8.98 directing the restoration of the land to the Government for the alleged breach of condition. Aggrieved from the Collector's order dt.29.8.98, the petitioner preferred a Revision Application being Revision Application No.42/98 before the Special Secretary (Appeals), Revenue Department, who allowed the said Revision by his order dt.9.12.98 directing the petitioner to complete the construction within a period of two months from the date of the order i.e. from 9.12.98 failing which the order passed by the Collector will operate. It was also directed by the Special Secretary (Appeals), Revenue Department in his order dt.9.12.98 that if the construction is completed within a period of two months, the order of the Collector would be treated as quashed. In this background, so far as the controversy with regard to the period before which the construction was to be completed in terms of the condition stipulated in the original allotment order was concerned was over and even if the construction was not completed before 10.1.86 as contemplated in the conditions of original allotment, under Special Secretary (Appeals) order dt.9.12.98, the petitioner could complete the construction before 9.2.99 i.e. within a period of two months from 9.12.98 and in fact the petitioner had also taken the task of completing the construction in right earnest immediately after the passing of the aforesaid order dt.9.12.98. However, that was not the end of the matter. The petitioner did come out of the constraints of time limit as per the original allotment under the Land Revenue Act and Rules, but her trouble was not over because the question of the completing the construction within a period of one year from the date on which the Idar Municipal Borough had granted the permission i.e.4.9.96 was beyond her reach now as the period of one year had already expired on 4.9.97 and now the petitioner was to face the objection of the breach of the condition incorporated in the permission granted by the Municipal Borough, Idar according to which she was to start the construction before 4.9.97 and, therefore, as per the say of the petitioner, the Officers of the Municipal Borough objected to the construction on 25.12.98. The petitioner thereupon submitted a representation before the President of the Idar Municipal Borough on 26.12.98 that the construction was being made within the time limit granted by the Special Secretary (Appeals) of the Revenue Department. On this very date

i.e. 26.12.98 a notice had also been given to the petitioner by the City Survey Superintendent relying upon the Collector's order under the Land Revenue Rules dt.29.8.98 being oblivious of the subsequent order passed by the Special Secretary (Appeals), Revenue Department on 9.12.98. It goes without saying that the City Survey Superintendent's notice dt.26.12.98 was, therefore, of no consequence in view of the Special Secretary (Appeals) order dt.9.12.98. The Chief Officer of the Idar Municipal Borough then issued a restraint order on 27.12.98 against the petitioner not to go ahead with the construction without the permission of the Municipality and to stop further construction. This restraint order dt.27.12.98 was served on the petitioner on 29.12.98, which was replied by the petitioner on 30.12.98 stating therein that she had already obtained the permission from respondent No.3 and that the construction was being carried out within time limit permitted by the Special Secretary (Appeals). The copy of the Special Secretary's order had also been submitted before the President of the Municipal Borough alongwith the earlier representation dt.26.12.98. The request was, therefore, made not to take any further action against the petitioner. The petitioner's case is that inspite of this on 31.12.98 the Officers and employees of the Municipal Borough alongwith members of the Committee came to the site of the construction with police force and demolished the entire construction including the walls and the shutters. Whereupon the present Special Civil Application was filed before this Court on 21.1.99 and on 25.1.99 notice returnable on 8.2.99 was issued. Thereafter, when the matter came up before the Court on 8.2.99, after hearing the counsel for the Municipal Borough and the learned counsel for the petitioner, the Court passed an order directing the time limit of two months (which was to expire on 9.2.99) to be extended till 31.3.99 subject to the rights and contentions of the authorities. The affidavit-in-reply dt.8.2.99 filed on behalf of respondents Nos.3 and 4 is on record to which the rejoinder dt.17.2.99 has been filed by the petitioner. No return has been filed on behalf of respondents Nos.1,2, 5 to 7. When the matter came up before this Court on 6.3.99 after hearing both the sides for some time, the Rule was issued but Mr. Pandya wanted time to file an additional affidavit and accordingly a further affidavit on behalf of respondents Nos.3 and 4 dt.8.3.99 has been filed today and in terms of the order recorded on 6.3.99 on the request of both the sides, the matter has been heard for final hearing today.

3. Having heard learned counsel for both the sides

and having gone through the pleadings of the parties I find that -

(a) so far as petitioner's title in respect of the land bearing City Survey No.5199 and City Survey No.6110 admeasuring 89.24 sq.mt. and 40.21 sq.mt. respectively situated at Idar is concerned, there is no dispute,

(b) In view of the order of Special Secretary (Addl.Chief Secretary) (Appeals), Revenue Department dt.9.12.98 issued on 21.12.98 there is no dispute with regard to such construction being raised under the Land Revenue Rules and it was open for the petitioner to complete the construction within the period as granted by the order dt.9.12.98 issued on 21.12.98 by the Special Secretary (Appeals), Revenue Department,

(c) The dispute is about the construction being raised by the petitioner on City Survey No.5199 and City Survey No.6110 on the ground that the petitioner had failed to commence the construction within a period of one year from the date of permission i.e. 4.9.96 to 4.9.97 and now she could not take up the construction work without a permission afresh and the order dt.9.12.98 passed by the Special Secretary (Addl.Chief Secretary) (Appeals), Revenue Department granting two months' time upto 9.2.99 under the Land Revenue Rules was irrelevant to extend the time limit under the Municipal laws.

(d) The dispute is with regard to the requirement of permission afresh after 4.9.97 by the Idar Municipal Borough in respect of this construction and the action which has been subsequently taken by the Municipal Borough in December 1998 to demolish the construction, which had already been raised by the petitioner.

4. On behalf of the Municipal Borough Mr. Pandya had initially raised two fold objections relying upon the permission letter dt.4.9.96, the xerox copy of which has been annexed by the petitioner at Annexure 'E'. This permission letter was issued on 4.9.96. The case of the Municipal Borough is that in view of the condition No.5 incorporated in this permission letter dt.4.9.96, the petitioner ought to have started the construction within the period of one year from 4.9.96 i.e.. on or before

4.9.97 and whereas the petitioner failed to avail this permission by not starting the construction within a period of one year, even if the Special Secretary (Appeals) Revenue Department had granted him permission to complete the construction within a period of 2 months from 9/21-12-98 in the proceedings under the Land Revenue laws, she could not have taken up the construction work now unless there was a fresh permission. The contention is that in terms of condition No.5 read with S.155(6) of the Gujarat Municipalities Act, 1963, the construction must commence within a period of one year from the date of the permission failing which fresh permission is required to be obtained and whereas the petitioner did not take any permission after 4.9.97, she could not take up the construction work in the year 1998, merely because the Special Secretary (Appeals), Revenue Department had permitted her to complete the construction in accordance with the Land Revenue Laws. The other objection that the permission was only in respect of City Survey No.5199 and not in respect of City Survey No.6110, which was raised initially during the course of arguments, is not pressed by the learned counsel appearing on behalf of the Municipal Borough on being instructed that the Plans had been sanctioned in respect of construction on both the City Survey Numbers.

5. This court is, therefore concerned to examine the question as to whether it was open for the petitioner to take up the construction work in December 1998 in face of the Municipal Borough's permission dt.4.9.96 or not. On this aspect of the matter, I find that the crucial requirement is that the construction should have commenced before 4.9.97. The petitioner had come with the case that she had started the construction after the permission of the Municipal Borough, as aforesaid, but she simply could not complete the construction on account of various difficulties and objections, to which the reference has already been made herein-above in the earlier part of this order and that she had only taken up the task of completing the construction and, therefore, the condition No.5 of the permission letter has not been violated and this could not be made the basis to take any action against the petitioner calling upon her to remove the construction or to demolish the construction. The respondent Nos.3 and 4 in their affidavit-in-reply dt.8.2.99, though made reference to the requirement under the conditions of the permission that if the construction was not started within a period of one year from the date of permission, the permission shall stand cancelled and, thereafter, new permission may be required, did not plead it as a fact that the petitioner had not started the

construction within a period of one year. Thus, the factual foundation for invoking the condition, as contained in the permission letter dt.4.9.96, was missing and in Para 3 all that was said was that the permission for construction dt.4.9.96 was granted in respect of City Survey No.5199 only, which stand has been given up today. On the last date of hearing i.e. on 6.3.99 when this specific query was posed to the learned counsel for the Municipal Borough, time was taken for filing the additional reply and the further reply dt.8.3.99, which has been filed today by the Municipal Borough, states that the petitioner did not start construction as per the permission letter Annexure 'D' within a period of one year from the date of the permission i.e. 4.9.96. It may be pointed out that the petitioner in her rejoinder dt.17.2.99 had categorically stated that after the permission was obtained on 4.9.96, the petitioner had started the construction but on account of some objections made by her neighbours, who had made application to the Collector, the petitioner could not complete the construction. These averments have been made in the end of para 4 of the petitioner's rejoinder dt.17.2.99. Besides this, I find from the Addl. Chief Secretary (Appeals), Revenue Department's order dt.9.12.98 as a part of the narration of the case of the parties that if the foundation had already been laid it cannot be said that the construction had not been commenced but the question still remains as to when did it commence? Thus, so far as the parties are concerned, i.e.. the petitioner vis a vis the respondents Nos.3 and 4 on the question of commencement of the construction, it is a case of oath against oath and it is rather difficult to say as to on which date the construction had actually commenced or as to whether it had commenced before 4.9.97 or any time thereafter. At the same time, in the facts and circumstances of this case, it is clear from the pleadings of the parties that the petitioner may have attempted to start the construction after seeking permission of the Municipal Borough on 4.9.96 because the allegation that the construction was obstructed have not been denied and it is a matter of record that such complaints were filed against the petitioner and the petitioner did face the objections by neighbours and obstructions which were created by the interested persons. Besides this, the fact also cannot be lost sight of that the permission had been granted by the Municipal Borough and, therefore, when the fact situation with regard to the commencement of the construction work within a period of one year is in dispute and the allegation that the commencement of the construction was obstructed are not denied, it can be safely said that the

petitioner, if at all could not commence the construction within a period of one year, could not do so for reasons beyond her control and comprehension and, therefore, her failure to commence the construction could not and should not have straightaway led to the demolition of the construction raised by her on the ground that construction had not been commenced within a period of one year, which is the basic fact and on which the parties are at dispute.

6. In any case, the learned counsel for the petitioner has submitted that the respondent - Municipal Borough could not take up the demolition of the existing construction without following the procedure prescribed under S.155 and he has also submitted that the requirement with regard to the commencement of the construction within a period of one year was not mandatory and is only a directory provision. S.155(6) of the Gujarat Municipalities Act, 1963 provides that the construction has to commence within a period of one year from the date on which the person becomes entitled to proceed with the construction and it is provided in S.155(7) that in case of contravention of the sub-sections (6) or (7) of S.155 or breach of the provisions of the Act or of any bye-law in force thereunder, the person is required to be punished with a fine and in case of continuing contravention of any of the aforesaid provisions, he shall be liable to an additional fine, which may extend to an amount upto one percent of the cost or ten rupees, whichever is greater, for each day during which such contravention continues after conviction for the first such contravention and the Chief Officer may direct that the construction, alteration, addition or reconstruction be stopped and upon a conviction being obtained under sub-section (7), by written notice require such construction, alteration, addition or reconstruction to be altered or demolished in accordance with the provisions of such notice. Section 155(6) and (7) are reproduced as under for ready reference:-

"155(6) No person who becomes entitled under sub-section (2) or (5) to proceed with any intended work of which notice is required by sub-section (1) shall commence such work after the expiry of the period of one year from the date on which he first became entitled so to proceed therewith, unless he shall have again become so entitled by a fresh compliance with the provisions of sub-sections (1) to (5). And no person to whom permission to erect or alter or add to any building has been granted by the Municipality under section 96 of the Bombay District Municipal Act, 1901, or of the Act as

adopted and applied to the Saurashtra area or under section 123 of the Bombay Municipal Boroughs Act, 1925 or of that Act as adapted and applied to the Saurashtra area or that Act as extended to the Kutch area shall be entitled to commence such work after the expiry of one year from the date on which this Act comes into force.

(7) Whoever begins any construction, alteration, addition or reconstruction without giving the notice required by sub-section (1) or without furnishing any plan, information or particulars required by or under this section, or except as provided in sub-section (5), without awaiting or in any manner contrary to such legal orders of the chief officer as may be issued under this section or contrary to the provisions of sub-section (5) or (6) or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to an amount to fifty percent of the cost of the construction, alteration, addition, or reconstruction, as the case may be, or one thousand rupees, whichever is greater and in the case of a continuing contravention of any of the aforesaid provisions, he shall be liable to an additional fine which may extend to an amount upto one percent of the cost or ten rupees, whichever is greater, for each day during which such contravention continues after conviction for the first such contravention; and the chief officer may-

(a) direct that the construction, alteration, addition or reconstruction be stopped, and

(b) upon a conviction being obtained under sub-section (7), by written notice require such construction, alteration, addition or reconstruction to be altered or demolished in accordance with the provisions of such notice."

7. The reading of these two sub-sections of S.155, make it very clear that while the permission for construction is to be availed by commencing the construction within a period of one year from the date on which the permission is granted, if at all the same is contravened, it may entail the fine and the penalty as mentioned in sub-section (7) and the direction to stop construction, alteration, addition or reconstruction in case of continuing contravention, but so far as the demolition is concerned, it can be done under S.155(7)(b) only after a conviction under sub-section (7). It is not the case of the respondents Nos.3 and 4 any where in the

pleadings that the petitioner has been convicted under sub-section (7). Thus, it is clear as a question of fact before this Court that the petitioner's conviction, as such, has not been obtained or recorded and the basic fact, which can form the foundation for such conviction, is in dispute between the parties. Be that as it may, the fact remains that the conviction has not been recorded and in absence of the conviction as contemplated under sub-section (7) of S.155, there was no question of taking up the task of demolition of the construction. The facts of this case disclose that the Special Secretary (Appeals), Revenue Department had passed the order in accordance with the Land Revenue Rules in December 1998 only and, immediately, thereafter on a complaint of some neighbour, the Municipal Borough swung into action and proceeded to demolish the already raised construction in a hot haste without obtaining the petitioner's conviction under S.155(7). It may also be mentioned that a violation of S.155(6) does not straightaway and necessarily entail the demolition because it is provided in sub-section (7) itself that such breach is punishable with fine and, therefore, even if a person commits breach of sub-section (6) of S.155 he can be suitably punished with fine in accordance with the provisions of sub-section (7) of S.155 and only thereafter the question can be considered with regard to demolition and even in cases when a party obtains the permission and fails to avail the same by not commencing the construction within one year, in an appropriate case the party may again apply for such permission and in appropriate cases such request for fresh permission can be considered in accordance with law. Here was the case in which the complaint was filed by some neighbours on 25.12.98 after Special Secretary (Appeals) Revenues Department's order dt.9.12.98, which was issued on 21.12.98 and immediately the Municipality proceeded to take recourse to the task of demolition while the petitioner has stated that on account of the month of Ramzan the petitioner and her family members had kept Roza and further that while the family members had gone for Namaz, the Officers of the respondent Nos.3 and 4 came and demolished the construction although there was no conviction recorded under S.155(7). Even otherwise, in the facts and circumstances of this case, keeping in view the order passed by the Special Secretary (Appeals) Revenue Department in December, 1998 in accordance with the Land Revenue Laws and keeping in view the entirety of the facts and circumstances of this case, it does not appear that the action of the respondents Nos.3 and 4 was justified so as to demolish the construction, which had already been raised and it is held that the action of the

respondents Nos.3 and 4 in demolishing the construction at the disputed site was not at all justified and they have not acted in accordance with the provisions of S.155 before demolishing the construction. Whereas the construction has been demolished without following the procedure prescribed by law it is a case in which the petitioner has been deprived of her property without following the procedure prescribed by law, it is a case of breach of Article 300A of the Constitution of India which provides that no person shall be deprived of his property save by authority of law.

8. The learned counsel for the petitioner has placed reliance on *Surat Borough Municipality v. Ishvarlal*, reported in XIII GLR 946 in support of his argument based on S.155(7). In *Surat Borough Municipality's* case (Supra) this Court was concerned with the case under Bombay Municipal Boroughs Act- Section 123(7) for the purpose of alteration or demolition of the offending construction and it was held that such power could be exercised only after conviction under S.123(7) and even then such powers cannot be used arbitrarily, such powers can be exercised only after giving show cause notice to the person concerned. The provisions of S.155(6) and (7) are in pari materia with the provisions of S.123(7) of the Bombay Municipal Boroughs Act with reference to which the *Surat Borough Municipality's* case (Supra) was decided and I find that the point involved in this case is covered by the aforesaid decision. Even otherwise the application of provisions of law requires the consideration of the fact situation obtaining in a given case. The authorities or functionaries who are empowered by Statute to take a particular action, have to be alive to the reality and the law cannot be applied in vacuum or by ignoring the hard facts. In the case at hand the fact could not be ignored that even if the petitioner could not commence the construction before expiry of one year from the date of permission, she could not do so, because of hinderances beyond her control and while the proceedings were pending before the Collector and thereafter until the Special Secretary (Appeals) Revenue Department's order dt.9.12.98 was passed setting aside the Collector's order dt.29.8.98 under the Land Revenue Rules, she could not have taken up the construction on the basis of the permission of the Municipal Borough.

9. In the facts and circumstances and for the reasons, as aforesaid, this Special Civil Application is allowed. It is directed that the petitioner shall be allowed to go ahead and complete the construction work as

permitted by the Special Secretary (Appeals), Revenue Department within a period of six months from today. Time of six months has been granted keeping in view the fact that the construction already raised by the petitioner has been demolished by the Municipal Borough and the petitioner may require some time to re-organize her resources. It will also be open for the petitioner to claim damages from the Municipal Borough in accordance with law for the loss suffered on account of the demolition of the construction and the respondents Nos.3 and 4 shall not interfere with the task of construction taken up by the petitioner henceforth, in case the petitioner proceeds with the construction in accordance with the Plans already approved by the Municipality as per the permission dt.4.9.96. The petitioner shall be entitled to a cost of Rs.5000/- from respondents Nos.3 and 4 only. Rule is made absolute accordingly.